

ILLINOIS POLLUTION CONTROL BOARD
July 24, 1975

FIRST UNITED NATIONAL CORPORATION,)
)
) Petitioner,)
)
)
) v.) PCB 75-196
)
)
) ENVIRONMENTAL PROTECTION AGENCY,)
)
) Respondent.)
)

OPINION AND ORDER OF THE BOARD (by Mr. Dumelle):

Petitioner, First United National Corporation (hereinafter First United), filed a petition on May 8, 1975 seeking a variance from the ban on further sanitary sewer connections in the southwestern area of the City of Springfield. First United owns and operates the George Lindsey Family Steak House, located at 2731 South MacArthur Boulevard in Springfield. This restaurant facility was previously connected to the Springfield sewer system without first obtaining a permit from the Environmental Protection Agency (Agency). The Agency placed this sewer system on restricted status on July 12, 1972 due to inadequate sewage handling and treatment capacity. An Agency recommendation to deny the variance was filed on May 9, 1975. No hearing has been held.

Although First United's petition does not address the public injury that would be imposed by a grant of the variance, as required under Rule 401(c) of the Board Procedural Rules, we take notice that the southwestern area of Springfield has long been plagued by sewer overflows and basement flooding during periods of rainfall. The occurrences and environmental and health consequences of this problem have been so well documented in other variances cases¹ that we need not reiterate them here. No allegation has been made in the petition that

¹See e.g., First National Bank v. EPA, PCB 72-301, 5 PCB 649 (October 10, 1972) and PCB 74-298, 14 PCB 723 (December 19, 1974); Illinois National Bank of Springfield v. EPA, PCB 72-300, 5 PCB 585 (October 3, 1972); Viking Investment Co., v. EPA, PCB 73-236, 5 PCB 637 (October 10, 1972); and Springfield Marine Bank v. EPA, PCB 73-348 10 PCB 347 (December 13, 1973) (dissent at 10 PCB 519) and PCB 74-117, Order at 12 PCB 667 (June 27, 1974), Opinion at 13 PCB 193 (July 25, 1974).

these problems have ceased. On the contrary, the Agency Recommendation indicates that the Springfield Sanitary District's application for federal grant funds to upgrade its sewer system has not yet been approved by the United States Environmental Protection Agency. Based on tentative plans to begin construction in June, 1977, as set forth in the Sanitary District's grant application, it will be at least several years before adequate sewer capacity is available in the MacArthur area.

Petitioner's facility has a seating capacity of 200. The Agency, using a formula (attributed to Mr. William Grills of the Illinois Department of Public Health) of 35 gallons of wastewater per day per seating space, estimates that the facility is expected to generate 7000 gallons per day of sewage. The Agency further notes that this exceeds the level required in Rule 951(b)(2) of Chapter 3 (Water Pollution Regulations), which provides that wastewater sources designed and intended to serve a single building to discharge less than 1500 gallons per day of domestic sewage are exempt from the permit requirement.

Actual water usage readings for the facility, obtained from the City Water Light and Power Company, are as follows:

<u>Meter Reading Date</u>	<u>Metering Period, Days</u>	<u>Meter Reading</u>	<u>Usage Unit</u>	<u>Gal.</u>	<u>Daily Ave. Use gpd</u>
January 27, 1975	32	1131	70	52,500	1640
February 25, 1975	29	1191	60	45,000	1552
March 21, 1975	23	1239	48	36,000	1565
April 24, 1975	34	1322	83	62,250	1830
Total	118		261	195,750	
Daily Ave. (118 days)					1658

The Agency accounts for the discrepancies between projected and actual water usage by noting that the projected figure is based on maximum capacity available. It is also noted that all figures, including the monthly averages, exceed the 1500 gpd limitation provided in Rule 951(b)(2).

First United purchased the property on which the restaurant is located on January 9, 1973. A contract was entered into with B.T. Kavanagh on July 30, 1973, to construct the facility. Construction was completed in April, 1974, and the restaurant has been in constant operation since that date. Under the contract, the contractor was required to "service and pay for all permits, governmental fees and licenses necessary for the proper execution and completion of work, which are applicable at the time bids are received."

First United contends that it was unaware of the necessity of obtaining a permit from the Agency, and assumed that the contractor had obtained all necessary permits. The contractor did in fact obtain a permit for a sanitary sewer connection from the Springfield Sanitary District. Such permit, attached to the petition as Exhibit 1, is dated November 30, 1973. The Agency cannot explain why such a permit was issued by the Sanitary District in view of the restricted status of the sewer system in the MacArthur area. The fact remains that it was incumbent on First United to obtain a permit from the Environmental Protection Agency, pursuant to Rule 951 of the Water Pollution Regulations, before beginning construction on its restaurant facility. Ignorance of this permit requirement can be no excuse for non-compliance. Moreover, the Agency points out that First United should have known of the restricted status of the sewer system, since it was highly publicized in the Springfield area. Furthermore, it should be noted that the area was placed on restricted status almost six months before the site was purchased and over one year before the construction contract was entered into.

Petitioner further contends that curtailment of its operation would create a severe and onerous financial burden, resulting in an arbitrary and unreasonable hardship. It alleges that the cost of the facility, including purchase, construction, fixtures and equipment, totals approximately \$372,188. It carries a \$150,000 construction mortgage on the facility and employs approximately thirty-three people. Although First United alleges a severe financial burden, there is no evidence that individual investors in First United would suffer an irreparable financial loss which would result in bankruptcy. Furthermore, we have consistently held that a denial of a variance is not an order to curtail operations; rather, it deprives a petitioner of protection from an enforcement action. Abex Corporation, AMSCO Division v. EPA, PCB 73-523, 11 PCB 477, 478 (March 7, 1974); Mobil Oil Corporation v. EPA, PCB 73-562 11 PCB 499, 500 (March 7, 1974). Finally, we note that First United has the option to pursue a remedy at law against its contractor for any damages resulting from a breach of its contractual agreement.

The Board, after weighing the economic hardship to the petitioner against the environmental and health hazards to the public, finds that petitioner has failed to establish an arbitrary or unreasonable hardship which would allow the Board to grant the requested relief.

One final matter remains to be considered. The Agency suggested that one possible solution to the petitioner's problem might be to install a holding tank to control flow to the sewer system during periods of precipitation. The record is inadequate to determine if such an approach would be feasible or warranted here, but the petitioner is free to further develop such alternatives with the Agency or before the Board in an appropriate proceeding.

This Opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

Petitioner's request for a variance from the Agency-imposed restricted status sewer system is denied.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 24th day of July, 1975 by a vote of 5-0.

Christan L. Moffett (gn)

Christan L. Moffett, Clerk
Illinois Pollution Control Board